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JAMES R. BROWNING

No. 925

In the Supreme Court of the United States

OCTOBER TERM, 1958

3963 BOTTLES, MORE OR LESS, ETC., OWEN LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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OPINION BELOW

The opinion of the court of appeals (Pet. 5a–13a) is reported at 265 F. 2d 332.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1959 (Pet. 14a). The petition for a writ of certiorari was filed on May 15, 1959. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Post Office Department, in terminating fraud order proceedings upon a stipulation by a seller of patent medicine that he

would cease making specified representations alleged to be fraudulent, bars a later action under the Food, Drug, and Cosmetic Act to condemn a quantity of the patent medicine shipped in interstate commerce and alleged to be misbranded and to be a new drug for which no application had been filed.

2. Whether a corporation may refuse to answer interrogatories concerning violations of the Food, Drug, and Cosmetic Act on the ground that officers of the corporation might be incriminated.

STATEMENT

1. Prior to the proceedings in this case, the Post Office Department filed a complaint with the Chief Hearing Officer of the Department alleging that petitioner was making false and fraudulent representations in the advertising of its patent medicine "Enerjol" and seeking, under 39 U.S.C. 259 and 732, the issuance of a fraud order against delivery of mail to petitioner (App. 59–61). Thereafter, on September 26, 1957, petitioner executed an "affidavit of agreement" which, after referring to the complaint, provided (App. 56–58):

> With a view to obviating the necessity for further proceedings herein, it is voluntarily agreed:
>
> That in any future mail order operation of the enterprise involved in this proceeding, affiant will not represent or make any claims for the preparation being sold in said enterprise that. * * * [enumerating 11 specific claims of beneficial effects of the medicine].
>
> That the acceptance of this affidavit by the Assistant General Counsel * * *, as a basis for

disposing of the pending charges now involved herein shall not be construed as an approval of any business which the said affiant has conducted or may hereafter conduct * * *;

* * * * *

Affiant understands that this affidavit relates exclusively to the proceeding specified in the caption hereof and its filing will not act as a defense or relieve the undersigned of responsibility for violation of any other statute, but the filing shall not be construed as a confession that the said instant statutes or any other statute has been violated; * * *.

Petitioner further agreed that upon resumption of the conduct agreed to be discontinued a fraud order might issue without further inquiry into the falsity of the representations. Petitioner discontinued using its previous circulars (App. 44), and no further action was then taken on the complaint.[1]

2. On December 9, 1957, the United States brought an action in the United States District Court for the Northern District of Illinois to condemn, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334), 3,963 bottles of "Enerjol" which had been shipped by truck in interstate commerce on November 18 and December 5, 1957. The amended libel of information alleged (1) that the article was misbranded in that the circulars accompanying it falsely represented that it was effective in the treatment of certain

[1]Petitioner states that in a later proceeding it was found that its new literature did not contain the representations agreed to be discontinued (Pet. 3-4). That proceeding, though immaterial in any event, is not part of the record in this case.

conditions for which it was not and (2) that the article was a new drug for which no effective application had been filed under 21 U.S.C. 355(b) (App. 4–5).

Petitioner filed a claim to the article seized and moved to dismiss the action and for summary judgment on the ground that the prior Post Office Department proceedings were a bar to the action (App. 41–43). The district court, in a memorandum opinion (App. 61–63), denied the motions.

The Government had served upon petitioner written interrogatories, under Rule 33, F.R. Civ. P., concerning the literature used by petitioner in the sale of its product (App. 11–41). Petitioner, after its objections to the interrogatories were overruled, refused to answer the interrogatories on the ground that the "matters inquired into are privileged under the Fifth Amendment" (App. 63–64). For petitioner's wilful failure to answer the interrogatories, the court, on the Government's motion under Rule 37(d), entered a default judgment decreeing condemnation of the property (App. 66–67). The court of appeals affirmed (Pet. 5a–13a).

ARGUMENT

1. Petitioner's contention that the prior Post Office Department proceedings should be a bar to this action is frivolous. The affidavit of agreement filed with the Department did not, as petitioner asserts, determine "permissive" advertising claims; it was simply a stipulation by petitioner that it would cease making, in its mail order operations, specified representations which the Department had charged were

fraudulent. It expressly disclaimed implied approval of any other representations or relief from compliance with any other laws. It is self-evident that, by agreeing not to make specified representations through the mails, petitioner did not acquire an immunity to ship mislabeled articles in interstate commerce by truck, whether the representations be the same or different.[2] Since his premise falls, there is no occasion to consider other defects in petitioner's argument (see, *e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334).

2. Petitioner contends that requiring it to answer the interrogatories violated the privilege against self-incrimination. It is settled, however, that the privilege does not extend to a corporation and that a corporate officer may not withhold corporate records on the ground that he might personally be incriminated. *E.g.*, *Curcio* v. *United States*, 354 U.S. 118, 122; *United States* v. *White*, 322 U.S. 694, 698–701. It is urged that an exception should be made where the corporation is charged with a violation of the Food, Drug, and Cosmetic Act, because the officers can be held liable without a finding of criminal intent on their part, citing *United States* v. *Dotterweich*, 320 U.S. 277. However, only those officers responsible for the particular transaction are held liable and, under Rule 33, F.R. Civ. P., any officer or agent of the corporation, including its attorney,

[2] Obviously, also, the prior proceedings could have no bearing on whether "Enerjol" was a "new" drug and therefore banned from commerce without an application having been filed under 21 U.S.C. 355(b)—an entirely separate ground for the condemnation action.

may answer interrogatories, thus eliminating the possibility of personal self-incrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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